BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MURIEL A. ELWOOD	)	
Claimant	)	
VS.	)	
	)	Docket No. 159,542
RUBBERMAID-WINFIELD, INC.	)	
Respondent	)	
AND	)	
	)	
LUMBERMEN'S MUTUAL CASUALTY CO.	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The respondent and insurance carrier request review of the Award of Special Administrative Law Judge William F. Morrissey entered February 7, 1994.

APPEARANCES

The claimant appeared by and through her attorney, Roger A. Riedmiller of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Frederick L. Haag of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Marvin R. Appling of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is the same as that enumerated in the Award of the Special Administrative Law Judge, with the addition of the transcript of the Regular Hearing, dated May 26, 1993. With that addition, the record as set forth in the Award of the Special Administrative Law Judge is hereby adopted by the Appeals Board.

STIPULATIONS AND ISSUES

The parties stipulated to all necessary elements of the claim, leaving for determination by the Appeals Board the sole issue of the liability of the Kansas Workers Compensation Fund, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having studied the entire evidentiary record filed herein and, in addition, the arguments and briefs of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant began work with respondent in March 1990 as a production worker. Within a month she began experiencing symptoms of pain and numbness in her right hand, arm, shoulder and neck. The company initially sent her to Dr. Toohey who diagnosed a possible ruptured disc in her cervical spine and treated her extremity with a cast and later a splint. More aggressive treatment was postponed due to claimant's pregnancy.

Claimant was referred by Dr. Toohey to Dr. Lucas who gave her injections in her wrist in February of 1991. The injections did not relieve her symptoms. She had a carpal tunnel release done by Dr. Lucas in June of 1991. She was referred to Dr. Klafta and had a C5-6 discectomy in November of 1991. In May 1992 she was treated for thoracic outlet syndrome by Dr. Harrison who performed rib resection surgery. After each of these procedures, claimant returned to work for respondent with restrictions. Claimant testified that her symptoms worsened to the point that in March 1993 she was unable to continue working. Subsequent to claimant's regular hearing testimony in May 1993, the deposition of Gary Espy was given in July. He indicated that claimant returned to work in a very accommodated job in June 1993, doing what he described as re-work. This is the only job available which does not violate her restrictions. It does not appear to be a regular full-time job that can be expected to continue indefinitely. It involves a variety of tasks, but basically means re-working previously packaged merchandise. It does not involve work on the production line. For purposes of computation of the award, date of accident is found to be the March 27, 1993, date claimant testified she left work due to her symptoms.

The deposition of Robert L. Eyster, M.D., was taken on behalf of the respondent. Claimant had seen Dr. Eyster for an independent medical examination on May 20, 1993. Dr. Eyster gave an opinion that claimant had a five percent (5%) impairment to the right forearm due to the carpal tunnel release. She had an additional six percent (6%) due to the discectomy and a three percent (3%) impairment to the body due to the rib resection of the first rib. These ratings he combined to an overall ten percent (10%) impairment to the body as a whole. In Dr. Eyster's opinion the claimant's condition continued to be aggravated by her work and resulted in the subsequent carpal tunnel, cervical and rib resection surgeries. The surgeries and ultimate permanent impairments would not have occurred but for the initial overuse conditions and their subsequent aggravation from her work.

Ernest R. Schlachter, M.D., conducted an IME for claimant on January 11, 1993. His evidentiary deposition was taken on behalf of the claimant. Dr. Schlachter related a history of increasing symptomatology following claimant's initial onset of pain in her right wrist, hand and up into her neck in April of 1990. His diagnosis was: status following C5-6 discectomy, overuse syndrome and tendinitis of the right shoulder girdle, thoracic outlet

syndrome and overuse syndrome with entrapment neuropathy of the ulnar nerve at the elbow and the median nerve at the wrist on the right. He assigned a ten percent (10%) permanent impairment of function to the body as a whole, due to her status following the cervical discectomy; a ten percent (10%) permanent partial impairment of function to the body as a whole, due to the overuse syndrome and tendinitis of the right shoulder girdle; a five percent (5%) impairment of function to the body, due to the thoracic outlet syndrome; and a fifteen percent (15%) functional impairment to the right upper extremity, due to the overuse syndrome with entrapment neuropathy of the ulnar nerve at the elbow and the median nerve at the wrist. The fifteen percent (15%) right upper extremity rating he converted to a nine percent (9%) whole body impairment and combined all ratings to a thirty percent (30%) permanent partial impairment to the body as a whole. He also imposed physical restrictions.

Dr. Schlachter testified that with an onset of injury in March 1990, claimant's condition would still be temporary in April 1990 when she was seen by Dr. Toohey. Her continued repetitive activity aggravated her condition and changed it from a temporary to a permanent one. He described her hand and neck complaints as the result of a series of traumas or micro-traumas. In his opinion the continued performance of repetitive activity resulted in her sustaining additional injuries. The carpal tunnel release would probably not have been necessary but for the repetitive activity involved in her continued working. Likewise, the neck complaints were a part of the overuse syndrome and developed as a result of the repetitive activity and continued aggravation. The discectomy more likely than not would not have been required but for the repetitive activities. In his opinion the thoracic outlet syndrome related to the overall condition because the patient compensated and used the neck and shoulder muscles more due to her hand and arm problems. This causes overuse syndrome and hypertrophy of the muscles and swelling of the neck which results in thoracic outlet syndrome. The rib resection would not have been necessary but for the continued repetitive activities at work. All four of his diagnoses would not have occurred but for her performing activities on a continual basis.

K.S.A. 1992 Supp. 44-567 addresses the issue of apportionment of liability between a respondent and the Kansas Workers Compensation Fund. K.S.A. 1992 Supp. 44-567(a) provides:

> "(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund.
>
> "(2) Subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the director shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's

preexisting physical or mental impairment, and the amount so found shall be paid from the workers' compensation fund."

K.S.A. 44-566(b) defines a handicapped employee as:

> ". . . one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:
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> . . . .
>
> "17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

The Appeals Board disagrees with the finding by the Special Administrative Law Judge that respondent has not proven that it is more probably true than not true that claimant's continuing problems all stem from the initial overuse syndrome and that work did not increase the injury. Therefore, the finding by the Special Administrative Law Judge that the Kansas Workers Compensation Fund should bear no part of the liability for her claim should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrisey dated February 7, 1994 denying liability against the Kansas Workers Compensation Fund is reversed. All compensation, medical expenses and costs in this matter are to be borne by the Kansas Workers Compensation Fund. The findings, orders and award of the Special Administrative Law Judge are otherwise affirmed and hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of June 1995.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

DISSENT

I respectfully dissent from the opinion of the majority. I would affirm the Award of the Special Administrative Law Judge. On the issue of the liability of the Workers Compensation Fund, the Special Administrative Law Judge found as follows:

> "I find that respondent has not proved that it is more probably true than not true that claimant's continuing problems involving surgery, loss of time from work, added impairment and added restrictions were the result of claimant continuing to aggravate her initial injury. All of claimant's problem[s] stem from the initial overuse syndrome. Her later work did not increase the injury. Each successive treatment and surgery simply addressed symptoms that all began with the overuse syndrome. Based on this conclusion, I find that the Kansas Workers Compensation Fund should bear no part of the liability for this claim."

In the opinion of all the physicians that testified in this case, the claimant's injuries were the cumulative result of repetitive use trauma or mini-traumas. The Kansas Court of Appeals in the case of Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994) applied a bright line rule for determining "date of injury" or "date of occurrence" for purposes of compensating a claimant for disability suffered as a result of carpal tunnel syndrome. In that case the Court of Appeals held "that the last day of work should be the date from when disability is computed in all cases involving carpal tunnel syndrome." The Court of Appeals determined that this rule is to be applied regardless of whether the repetitive trauma condition is diagnosed or manifests itself several months after a claimant leaves his job or several months before the condition becomes so painful and debilitating that the claimant can no longer perform his or her job functions. In determining the date of injury or date of occurrence in that case to be claimant's last day of work, the Court of Appeals also established that date as a bright line rule to be applied in similar carpal tunnel cases in the future.

In this case, claimant's injuries were the cumulative result of repetitive trauma suffered virtually throughout her entire period of employment with the respondent. To isolate a date where claimant's symptoms were first manifested or when she first sought medical treatment for those complaints and then establish that point in time as being the preexisting condition and handicap from which Fund liability flows, I believe, does not follow the logic of the Court of Appeals in Berry, nor does it serve to promote the purpose of the Kansas Workers Compensation Fund. Although it can be argued that the respondent thereafter retained a handicapped worker, the fact is that the respondent had an affirmative duty to provide medical treatment for the conditions which claimant had sustained from her employment and further had a duty to reasonably accommodate that worker's handicap so as to keep her in its employment if reasonably able to do so. The fact that the claimant continued to work for the respondent for a period of time following her onset of symptoms and returned to work for the respondent for a time following her three (3) surgeries was not because of a perception on the part of the respondent that it could shift liability for claimant's work-related injuries to the Workers Compensation Fund, but rather was a part of the respondent's responsibility to that injured worker separate and apart from the issue of Fund liability.

The record in this case, including the testimony of the claimant and the opinions expressed by the medical experts, does not point to a date or dates from which each of

claimant's several conditions can be said to have become permanent, and yet to have stabilized but for her continued work, either within or outside the restrictions recommended by the various physicians. Rather, the evidence is that claimant's condition gradually but continually worsened through her last date worked. In finding claimant's date of accident to be her last date worked, I believe it to be inconsistent to then say that at some point claimant became a handicapped employee and liability shifted to the Fund. There is no evidence upon which to apportion liability between the respondent and the Fund in this case. Instead, it is an all-or-nothing proposition due to the testimony that at the time claimant was initially diagnosed, her condition was not yet a permanent impairment. Nevertheless, the majority is willing to find that she was at that time a handicapped worker. That question aside, it appears to this writer to be consistent with the holding in Berry to find, as did the Special Administrative Law Judge, that claimant's injuries in this case all stem from the initial overuse syndrome. While I do not agree with the Special Administrative Law Judge that claimant's later work did not increase or aggravate her injuries, those injuries were, nonetheless, of an ongoing and cumulative process which should be treated as one accident culminating on her last date of work. As such, the responsibility for this accident should remain with the respondent.

BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS
Frederick L. Haag, Wichita, KS
Marvin R. Appling, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director